internet access, since CLECs cannot under those circumstances compete for customers in the RLECs' territories. T. 280, 292-93, 295.

There is nothing, however, in the *ISP Remand Order* that indicates that the FCC considered calls to ISPs whose modem banks are outside the caller's "local" area, and, therefore, outside the scope of the FCC's jurisdiction, not subject to the FCC's compensation regime, or subject to access charges. The references in the *ISP Remand Order* to calls within "a local calling area" do not, ipso facto, demonstrate that the FCC intends to treat calls to ISPs with local NPA-NXX codes differently, depending on where the ISP's modem banks are located. See *ISP Remand Order* at ¶1 ("we reaffirm our previous conclusion that traffic delivered to an ISP is predominantly interstate access traffic subject to section 201 of the [Communications Act of 1934, as amended]"). "Local calling area" is a term used by the FCC to denote calls which, while "local" to the caller because of the NPA-NXX dialed, remain nevertheless "interstate" for purposes of jurisdiction and the FCC's unique compensation regime for ISP-bound traffic. T. 288, 298.

Moreover, it would have been absurd for the FCC to have delimited treatment of ISP-bound traffic to calls to ISP modem banks within the caller's geographically "local" area, when the end points of the call are interstate and international. Yet this is exactly the illogic in which the RLECs engage, in arguing that the FCC did not assume regulation of ISP-bound traffic when the modem is located physically outside the local calling area.[16] T. 41-42, 209-10. There is no meaningful distinction to be drawn based on

[16] The RLECs contend that a court has "recognized" that the *ISP Remand Order* applies only to calls made to modems physically located in an area served by a local call. As a means to synopsize the ISP Remand Order on appeal, the D.C. Circuit simply referred to the order as compensation "provisions" of the

location of the modem banks, and it would have been absurd for the FCC to have done so, given the goals of encouraging interconnection and the growth of advanced services, as well as the given the "interstate" nature of ISP-bound traffic.[17]

Nor is there any evidence the FCC considered compensation for ISP-bound calls to harm the access charge regime when the CLEC's modems are physically located outside the local calling area. It is particularly troubling that the RLECs make such an argument, when they offer broadband and dial-up internet access, and when use of their affiliates' Vonage-type product cannot possibly result in accurate determination of the end points of the call for inter-carrier compensation. T. 161-62, 209, 212.

In its *Adelphia* decision, the Commission determined the compensation regime applicable to virtual NXX generally. That decision, however, did not specifically concern calls to ISPs, and was issued before the FCC assumed jurisdiction and determined the compensation for such calls in its *ISP Remand Order*. T. 267. Subsequent to the *ISP Remand Order*, the Commission issued its *US LEC* decision.[18] In that order, the Commission acknowledged:

> [T]he D.C. Circuit has remanded the ISP Remand Order, but has expressly refused to vacate the order, as a result, the rules the FCC

FCC applicable "only to calls made to [ISPs] located within the caller's local calling area." *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002). There was no question before the court as to the scope of the FCC's intended compensation "provisions" and the court's shorthand characterization was not intended as a ruling on the merits.

17 Cf. *MCImetro Access Transmissions Services. Inc. v. BellSouth Telecommunications, Inc.*, 352 F.3d 872 (4th Cir. 2003) (permitting ILEC to charge CLEC for cost of transporting calls originating on local exchange carrier's network to CLEC's chosen point of interconnection (POI) violates 47 C.F.R. 703(b), promulgated under section 251(b)(5) of Telecommunications Act, which prohibits local exchange carriers from charging for calls originating on their own networks.)

18 *In re: Petition Of US LEC Of South Carolina, Inc. For Arbitration With Verizon South, Inc., Pursuant To 47 U.S.C. 252(b) Of The Communications Act Of 1934, As Amended By The Telecommunications Act Of 1996*, Docket 2002-181-C, Order on Arbitration, Order No. 2002-619 (August 30, 2002).

> adopted remain in effect pending further FCC proceedings on remand. The FCC's ISP Remand Order sets forth a specific intercarrier compensation regime that concerns the exchange of ISP-bound traffic between Verizon South and US LEC during the course of this arbitrated agreement. This issue arises to address possible solutions in case there is a subsequent change of law on this point during the term of the interconnection agreement. Federal law does not obligate Verizon South, or entitle this Commission, to impose rules to address potential contingencies with respect to the meaning of federal law. Compensation for ISP-bound traffic, and all reciprocal compensation traffic, should be paid in conformance with federal law which governs the issue.[19]

Thus the Commission has recognized the applicability of the *ISP Remand Order*, and its continued vitality, with regard to ISP-bound traffic. See T. 266-67, 271.

Other state commissions have ruled in favor of CLECs as regards this issue. For example, the Alabama Public Service Commission has determined that ISP-bound virtual NXX calls are predominantly considered "interstate" and thus are subject to FCC jurisdiction.[20] The Alabama commission further concluded that carriers may continue to assign telephone numbers to end users physically located outside the rate center to which the numbers they are assigned are homed. The Alabama commission also noted that ILECs have traditionally treated virtual NXX traffic as local in all respects, including with regard to inter-carrier compensation. Likewise, the Texas Public Utility Commission upheld a finding that

> the compensation mechanism in the *ISP Remand Order* shall apply to all ISP-bound calls. The Arbitrators stated that "all ISP-bound traffic falls under the compensation mechanism outlined in the ISP Remand Order. Consequently, the Arbitrators found that all ISP-bound traffic, whether provisioned via an FX/FX-type arrangement or not, is subject to the

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19 Id. at p. 30.

20 *Declaratory Ruling Concerning the Usage of Local Interconnection Services for the Provision of Virtual NXX Service*, Docket 28906, Declaratory Order, Alabama Public Service Commission (April 29, 2004).

> compensation mechanism contained in the FCC's *ISP Remand Order*.' Consistent with this conclusion, the Commission withdraws its decision applying access charges to traffic bound for ISPs outside the local calling area.[21]

Accordingly, such calls are appropriately within the scope of interconnection agreements and may be transmitted on "local" interconnection trunks, T. 211-12, and the Commission approves MCI's language

III. Reciprocal Compensation Rate - (Issue 21)

Issue 21: What should the reciprocal compensation rate be for out-of-balance Local/EAS or ISP-bound traffic? (Pricing, D)

MCI Position: This is the rate set in the FCC's order on CLEC reciprocal compensation rates.

RLEC Position: As discussed in Issues 8 and 13, there is not a need for a reciprocal compensation rate. In fact, during the entire course of negotiations the Parties never discussed what would be the appropriate reciprocal compensation rate. All of the discussion surrounded if there should even be reciprocal compensation. This issue has not been discussed in negotiations and is not ripe for arbitration.

MCI proposes the rate of $.0007 per minute for "out of balance" non-ISP-bound "local" traffic and for "out of balance" ISP-bound traffic.[22] The RLECs make two arguments: that 1) MCI did not negotiate the terms of such compensation; and 2) the RLECs are not "opting into" the "interim" compensation scheme established by the FCC in its *ISP Remand Order*. See T. 13, 60.

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[21] Order on Reconsideration, in *Consolidated Complaints and Requests for Post-Interconnection Dispute Resolution Regarding Intercarrier Compensation for "FX-Type" Traffic Against Southwestern Bell Telephone Company*, Docket No. 24015, Texas Public Utility Commission (2004).

[22] See footnote 13, *supra*.

With regard to the RLECs' first contention, MCI negotiated on the basis of the applicability of the *ISP Remand Order* to ISP-bound traffic between the parties. See T. 300-01. The RLECs do not dispute that the FCC's order was the subject of negotiations. The $.0007 rate was determined by the FCC in that order. Hence the RLECs' claim is without merit.

Concerning the second argument, $.0007 is no longer an "interim" rate, pursuant to the *Core* decision. T. 158-59, 162. Moreover, the RLECs turn the *ISP Remand Order* on its head: the FCC stated that the rate and volume *caps* on compensation applied by that order would apply only if an ILEC offered to exchange all traffic subject to section 251(b)(5), i.e., for all "local" traffic that is not ISP-bound, at the same rate. An ILEC that does not offer to exchange section 251(b)(5) traffic at these rates *must* exchange ISP-bound traffic at state-approved or state-negotiated reciprocal compensation rates. *ISP Remand Order*, ¶¶8, 89. The FCC's intent was not that ILECs, by refusing to exchange ISP-bound traffic at the FCC's compensation rate – now $.0007 – would be entitled to exchange such traffic at *less than* that rate, or, as ILECs imply, at "bill and keep." Rather, the FCC intended that the ISP-bound rate would be *more than* the FCC's *capped* rates. In paragraph 89 of the *ISP Remand Order* the FCC stated, in relevant part:

> It would be unwise as a policy matter, and patently unfair, to allow incumbent LECs to benefit from reduced intercarrier compensation rates for ISP-bound traffic, with respect to which they are net payors, while permitting them to exchange traffic at state reciprocal rates, which are much higher than the caps we adopt here, when the traffic imbalance is reversed. Because we are concerned about the superior bargaining power of incumbent LECs, we will not allow them to 'pick and choose' intercarrier compensation regimes, depending on the nature of the traffic exchanged with another carrier...Thus, if the applicable rate cap is $.0010 [per minute of use], the ILEC must offer to exchange section 251(b)(5) traffic at that same rate. Similarly, if an ILEC wishes to continue to exchange ISP-bound traffic on a bill and keep basis in a state that has

> ordered bill and keep, it must offer to exchange all section 251(b)(5) traffic on a bill and keep basis. For those incumbent LECs that choose not to offer to exchange section 251(b)(5) traffic subject to the same rate caps we adopt for ISP-bound traffic, we order them to exchange ISP-bound traffic at the state-approved or state-arbitrated reciprocal compensation rates reflected in their contracts. This 'mirroring' rule ensures that incumbent LECs will pay the same rates for ISP-bound traffic that they receive for section 251(b)(5) traffic.

Read in its entirety, three conclusions may be drawn from this paragraph: 1) the caps on compensation for ISP-bound traffic were intended to be *floors*, not ceilings, on the compensation due from ILECs in default of negotiations; 2) the RLECs, having contended in their pleadings and testimony that "no reciprocal compensation rate was negotiated," T. 64, may not now contend that the rate for such traffic should be simply "bill and keep;" and 3) by having chosen not to offer to exchange section 251(b)(5) traffic at the FCC's capped rates, the RLECs must now exchange traffic at reciprocal compensation rates. Under the circumstances, MCI's proposal of $.0007 – which is *below that* of the approved BellSouth reciprocal compensation rate in this State of $.0012655– is reasonable and is approved by the Commission.

IV. Calling Party Identification (CPN/JIP) - (Issues 3, 14, 16)

Issue #3: Should companies be required to provide JIP (Jurisdiction Information Parameter) information? (General Terms & Conditions, §9.5)

MCI Position: No. This is not a mandatory field. No other ILEC has asked that MCI provide this information, let alone on 90% of calls. The National Information Industry Forum is still working on rules for carriers choosing to populate this field for VOIP traffic and wireless carriers. The revised instructions for landline carriers was only released in December. MCI does not oppose putting "OR" as a condition of providing this or CPN on calls. But there is only a legal mandate to provide CPN currently.

RLEC Position: Yes. RLECs should have the ability to determine the proper jurisdiction of the calls delivered to their switches. Jurisdiction Information Parameter (JIP) is one of the pieces of information that is available and technically feasible which

supports the RLECs ability to establish the proper jurisdiction of calls terminating to their networks. The NIIF strongly recommends that JIP be populated for both wireline and wireless carriers where technologically possible.

Issue #14: Should Parties be required to provide (a) CPN and JIP and (b) and pay access charges on all unidentified traffic? (Interconnection, §2.7.7)

MCI Position: MCI (a) is willing to provide CPN or JIP, but not both as the latter is an optional SS7 parameter. (No other ILEC has proposed that MCI must provide JIP) and (b) believes that all unidentified traffic should be priced at same ratio as identified traffic. A price penalty should not be applied for something MCI does not control. MCI is open to audits and studies by either Party if one or the other thinks the 10% or more of traffic missing CPN information is an effort to avoid access charges.

RLEC Position: Yes. In order to properly identify the jurisdiction of the traffic exchanged between the parties, the parties should be required to provide CPN and JIP. The parties should have
an incentive to properly identify the jurisdiction of the traffic exchanged between them.

Issue #16: Should Parties have to provide the specified signaling parameters on all calls? (Interconnection, §3.6)

MCI Position: No. Percentages for CPN have been set above and JIP is not mandatory. MCI will agree not to alter parameters received from others, but it cannot commit to more 90% CPN being provided.

RLEC Position: Yes. All signaling parameters are to be included in the signaling information whatever the source.

This group of issues concerns the information that is exchanged between carriers for call set-up, routing, and rating of calls. Calling Party Number ("CPN") is an established signaling parameter that assists carriers in determining the locations of the user making the call. CPN is the industry standard for transmitting messaging for the jurisdictional origin of a call. "Back office" systems for billing, rating and auditing are designed based on CPN. CPN is also required under law. See 47 C.F.R. part 64. Accordingly, MCI's switches pass CPN to other carriers in accordance with industry standards and the law. T. 145-46, 150, 204, 333.

The RLECs propose that the parties be required to exchange the Jurisdictional Indicator Parameter ("JIP") as well as the CPN. JIP is a six-digit (NPA-NXX) field in the SS7 message. T. 144. The RLECs, however, concede that JIP is a signaling parameter new to the industry and that it is not a mandatory parameter. See T. 79, 88, 144, 330-31, 333. ("The NIIF [Network Interconnection Interoperability Forum] does not recommend proposing that the JIP parameter be mandatory." T. 86.) The parties also agree that the Alliance for Telecommunications Industry Solutions ("ATIS") a voluntary forum, is still working on rules for carriers to implement JIP, particularly for VoIP and wireless traffic. T. 85, 331. Populating the JIP field, then, within the SS7 message is optional.

Other carriers, particularly those within the region, including BellSouth, have not required JIP. See T. 87. The interconnection agreements entered into between affiliates and BellSouth do not require JIP. Moreover, the RLECs' affiliates' interconnection agreements with BellSouth contain provisions that require NPA-NXX codes to be utilized in such a way so that local traffic can be distinguished from IntraLATA toll traffic, "regardless of the transport protocol method" used.[23] T. 145, 200, 202-03, 332.

CPN cannot be selectively manipulated or deleted en route. T. 148. MCI will not misrepresent CPN. T. 148, 204. Except for ISP-bound calls, the CPN the parties receive as local/EAS calls should have addresses associated with them in the 911 databases. The ISPs served by MCI will be easily identifiable; i.e., the calls are one-way, to MCI's ISP customers, and to a limited number of NPA-NXX codes. T. 204. Unlike Hargray's

[23] See Hargray's affiliate's interconnection agreement at Attachment 3, section 6.2 and 3.2; Home's affiliate's interconnection agreement with BellSouth, attachment 3, section 8.1 and 5.2; and PBT's agreement with BellSouth, attachment 3, section 6.2. This language is what MCI has agreed to do in this proceeding for non-ISP traffic.

affiliate's service, TWCIS' service is stationary, with numbers assigned only by the location of the end user. For another carrier to opt-into those parts of the interconnection agreement that discuss identification of the jurisdiction of the call, the carrier has to opt-into the entire agreement, which includes audit rights. T. 149, 151. Thus JIP is not only not required; it is unneeded in the present context.

A major reason for the development of JIP relates to the growth of the wireless industry. For example, if someone from New York uses a cell phone in a Florida hotel, the cell phone number will indicate what carrier is being used to originate the call, and the extra six digits in JIP could indicate the physical cell site location that originated the call. In the wireless context, this additional information could determine the routing of the call, and facilitate access to toll-free calls, which sometimes are blocked at present. These concerns are not present with stationary, wireline service. Although in contexts other than wireless the industry has been concerned about "phantom traffic," which is defined as calls that lack sufficient information to determine the jurisdiction (i.e., interstate or intrastate) of the traffic for billing purposes, this is an open issue in the FCC's intercarrier compensation proceeding and as such is another reason the Commission does not adopt the RLECs' proposal. T. 146, 204.

MCI's class 5 switches – i.e., those used for local service – are in Atlanta and Charlotte. Each RLEC will be assigned to one or the other switch. T. 143. This type of arrangement is not unusual for CLECs, which use a limited number of switches to cover multiple ILEC serving areas, crossing state and LATA boundaries. T. 143-44. Given this reality, some examples may serve to illustrate the difficulty in implementing the RLECs' proposal: An call originated in Columbia, South Carolina would go to MCI's

switch (either in Atlanta or Charlotte). Assume that the call is to be delivered to an end user in Columbia. The use of JIP would indicate this is a toll call from Atlanta/Charlotte. The call, however, should be rated and billed to the originating end user as a local call. T. 147. This situation is similar to the scenario RLECs describe, T. 83, in that the JIP of the switch would not "accurately represent" the location of the caller. Using a different example, assume the originating end user is in Columbia, the switch is in Charlotte, and the terminating end user is in Charlotte. This call should be rated as a toll call, but it will be characterized as local call based on the JIP to the terminating end user. T. 148. Indeed, as the RLECs admit, when the Hargray affiliate's VoIP-product is used to originate a call from outside the LATA to which the NXX code for the product has been assigned, the JIP that "is going to show up is from the Hargray switch in Pritchardville," T. 348, thus ensuring that the JIP will not properly identify the call consistently with what the RLECs demand in this proceeding. Thus it is evident that JIP is not a panacea for the jurisdictional rating of traffic.[24]

MCI will pass JIP, but it will be only the JIP of the MCI switch. This limited use of JIP cannot be used to accurately rate traffic. MCI will not and cannot pass a unique JIP for every LATA served by its switch as the RLECs request. T. 90, 147, 149-50 200-02. Further, a unique JIP for every LATA is not required. Indeed, a requirement that CLECs provide a unique JIP for every local calling area served by a CLEC switch would require the scope of the CLEC switch to be limited because separate partitions would have to be created for each JIP and separate "look-up" tables would have to be managed

[24] Thus if a call is generated from a wireline phone and terminates with a wireless phone, it is difficult to know in what location the call termination has occurred, because that JIP field has not yet been addressed. It is difficult for the terminating carrier to determine in what city the caller was located. This could affect, for example, the rates charged. T. 146-47.

and created for each RLEC local calling area. This would create significant additional equipment, software and administrative cost and would create network inefficiency. The economies of scale available to CLECs for switching would be drastically reduced. Moreover, a requirement that CLECs provide RLECs with a unique JIP for every local calling area served by the CLEC switch would cause CLECs to limit the calling area scope of their class 5 switches and to exit certain markets, and would undermine the FCC's recent *TRRO* decision[25] that CLECs are not impaired without access to ILEC unbundled switching. T. 150, 201, 314-15.

Issue #14 concerns traffic that lacks CPN or JIP (as proposed by MCI) or that lacks CPN and JIP (as proposed by the RLECs). MCI proposes that unidentified traffic be treated as having the same jurisdictional ratio as the ratio of the identified traffic. The RLECs agree with this premise, *except* that if the unidentified traffic exceeds 10% of the total traffic, then the RLECs demand that *all* the unidentified traffic shall be billed at the RLECs' access charge rates. T. 93, 334. The RLECs' proposal is unnecessary. Concerns over fraud should be dealt with by the parties through audit provisions and cooperative efforts pursuant to language to which they have already agreed. T. 152.

Issue #16 raises the question whether the parties always must pass the signaling parameters that are the subject of this dispute (CPN and/or JIP) to the other interconnecting carrier, or whether these parameters will be passed along as they are received. MCI's language is to be preferred, because no party can guarantee that CPN will exist on all calls. MCI, no differently than other carriers, will have as much control

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[25] See *In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, FCC 04-290, (rel. February 4, 2005), ¶¶207, 209, 222-23.

over traffic to and from TWCIS as the RLECs themselves have over traffic to and from their customers. T. 125, 152-53. For these reasons MCI's language for this group of issues is adopted by the Commission.

CONCLUSION

The parties are directed to implement the Commission's resolution of the issues addressed in the Order by incorporating the language approved by the Commission.

The parties are directed to, and shall, file the conforming agreement with the Commission within sixty (60) days of receipt of this Order.

The Commission retains jurisdiction of this arbitration until the parties have submitted an interconnection agreement for approval by the Commission in accordance with Section 252(e) of the Act.

This order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION.

_____

Attest:

_____

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of Sprint Communications Company L.P., Overland Park, Kansas, Petition for arbitration under the Telecommunications Act, of certain issues associated with the proposed interconnection agreement between Sprint and Southeast Nebraska Telephone Company, Falls City.	) Application No. C-3429))) FINDINGS AND CONCLUSIONS))))) Entered: September 13, 2005

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BY THE COMMISSION:

I. BACKGROUND

1. Petitioner, Sprint Communications Company L.P. (Sprint), is a limited partnership that has been certificated by the Nebraska Public Service Commission (Commission or NPSC) to provide competitive local exchange carrier (CLEC or competitive LEC) and other telecommunications services in the State of Nebraska, including local exchange areas served by the Respondent, Southeast Nebraska Telephone Company (SENTCO).

2. SENTCO is a corporation and is a rural incumbent local exchange carrier (ILEC) that has been certificated by the Commission to provide LEC and other telecommunications services in certain local exchange service areas in the State of Nebraska.

3. On December 16, 2004, SENTCO received a request from Sprint to negotiate terms and conditions of an interconnection agreement pursuant to § 252(a) of the Telecommunications Act of 1996 (the Act). Thereafter, the parties proceeded with negotiations. As part of that negotiation, SENTCO made clear to Sprint, and Sprint confirmed, that SENTCO would not be engaging in voluntary negotiations "without regard to the standards set forth in subsection (b). . . of section 251." 47 U.S.C. § 252 (a)(1); see also Ex. 4. As a result of such negotiations, Sprint and SENTCO resolved all but two issues relating to the interconnection agreement.

4. On May 23, 2005, Sprint filed a Petition for Arbitration with the Commission, pursuant to § 252(b) of the Act, seeking arbitration as to the remaining open issues. Attached to the Petition was the Interconnection and Reciprocal Compensation Agreement (the Agreement) between the parties that contains the terms and conditions of interconnection as agreed upon by the parties. The Agreement also reflects in Sections 1.6 and 1.22 the provisions that are disputed between the parties. On June 17, 2005, SENTCO filed its Motion to Dismiss, or in the alternative, its Response to the Petition for Arbitration.

5. On June 14, 2005, in response to SENTCO's Motion requesting that the Commission act as the arbitrator in this matter as opposed to a third party arbitrator, the Commission entered its Order granting SENTCO's Motion and designated the Commission to act as the arbitrator in this matter. Sprint did not oppose this designation.

6. On June 22, 2005, a planning conference was held by the Hearing Officer. A Planning Conference Order was entered by the Hearing Officer on June 28, 2005 that approved the parties' agreement that SENTCO's Motion to Dismiss would be resolved in conjunction with the Commission's decision in this proceeding after the presentation of evidence and submission of proposed orders and briefs. Such Order also established a schedule for completion of the arbitration.

7. The hearing of this matter was conducted by the Commission on August 10, 2005 pursuant to the Arbitration Policy established in C-1128, Progression Order No. 3 dated August 19, 2003. Evidence and testimony was introduced and received into the record. Pursuant to the Planning Conference Order, following the hearing the parties were advised that proposed orders and Post-Hearing Briefs should be submitted to the Commission on or before September 2, 2005.

II. ARBITRATED ISSUES

8. The two unresolved issues expressly identified and raised by Sprint in its Petition for Arbitration, and addressed in the Response thereto are:

> Issue I: Should the definition of "End User or End User Customer" include end users of a service provider for whom Sprint provides interconnection and other telecommunications services? (Section 1.6 and as applied elsewhere in the Agreement.)
>
> Issue II: Should the definition of "Reciprocal Compensation" include the transportation and termination on each carrier's network of all Local Traffic? (Section 1.21 and as applied elsewhere in the Agreement.)

III. CASE SUMMARY

9. The parties agree that if Sprint's intended use of the Interconnection Agreement were limited to Sprint's provision of telecommunications service to Sprint retail customers located in SENTCO's exchange service areas, no issues would exist between the parties requiring arbitration. Tr. 99:14-19. Sprint has entered into a business arrangement with Time Warner Cable Information Services (Nebraska) LLC d/b/a Time Warner Cable (Time Warner) to support Time Warner's offering of local and long distance voice services in the Falls City area. SENTCO disputes that Sprint is entitled to utilize the Agreement for

the benefit of Time Warner or any other third party. (*See generally*, Ex. 2).

10. Sprint expressed no intention of being the retail provider of telecommunications services. Rather, Time Warner will provide retail voice telecommunications services, will exclusively have all customer relationships, will market the service in the name of Time Warner, will perform all billing functions and will resolve all customer complaints. Tr. 27:9-28:1. Sprint has entered into a Wholesale Voice Services Agreement with Time Warner pursuant to which Sprint intends to provide certain telecommunications services to Time Warner on a wholesale basis. Ex. 20, Confidential Attachment.

11. The network over which telecommunications service is proposed to be provided to Time Warner's customers consists of a combination of Sprint and Time Warner facilities. *See* Ex. 107. In the case of a call originated by a Time Warner customer to another Time Warner customer, the call would be handled entirely by Time Warner on its own network. *See* Ex. 16, 13:11-23. In the case of a call originated by a Time Warner customer to a party that is not a Time Warner customer, the call travels from the customer's premises over Time Warner facilities to the Time Warner soft switch which routes the call to a gateway device that converts the call from Internet Protocol to circuit switched format, at which point the call would be passed to the Sprint network for termination. Ex. 16, 14: 2-15, 31:5-21 and Ex. 12, Ex. E. Time Warner's soft switch is responsible for routing of calls originated by Time Warner customers. *See* Ex. 16, 32:4-10. The soft switch directly serves the Time Warner customer.

O P I N I O N A N D F I N D I N G S

IV. PRELIMINARY ISSUES

12. On July 29, 2005, Sprint filed a Motion in Limine seeking to exclude from evidence certain documents that SENTCO had identified as exhibits in response to the schedule requirements set forth in the Planning Conference Order. SENTCO submitted a written Response to the Motion in Limine. On August 5, 2005, the Hearing Officer entered an Order that granted Sprint's Motion with regard to Exhibits 7, 13 and 14, and overruled Sprint's Motion in all other respects.

13. At the hearing, SENTCO offered Exhibits 7, 13 and 14 in evidence. The Hearing Officer reserved ruling on these

offers and on August 17, 2005 issued a Hearing Officer Order sustaining Sprint's objections to such exhibits.

14. On August 8, 2005, Sprint also filed a Motion to Strike the Rebuttal Testimony of Steven E. Watkins. SENTCO submitted a Response to the Motion to Strike on August 9, 2005. Later in the day on August 9, the Hearing Officer entered an Order denying the Motion to Strike. Mr. Watkins testified at the hearing of this matter and his Pre-filed Rebuttal Testimony and attachments were received in evidence as Exhibit 22. The Commission affirms the Hearing Officer's August 9, 2005 denial of Sprint's Motion to Strike and the admission of Exhibit 22 in evidence. We do not regard this rebuttal testimony as Mr. Watkins' testifying to a legal question as Sprint contends in its Motion to Strike, any more than similar statements regarding the Act and applicable FCC rules that are cited and addressed by Sprint's witness, James Burt.

V. JURISDICTION

15. Section 252(e)(1) of the Act requires that any interconnection agreement adopted by arbitration be submitted to the state commission for approval. The Commission's review of the arbitrated agreement is limited by § 252(b)(4) of the Act, which provides, "Action by State Commission. (A) The state commission shall limit its consideration of any petition [for arbitration] under paragraph (1) [of § 252(b) of the Act] (and any response thereto) to the issues set forth in the petition and the response, if any, filed under paragraph (3)." Thus, in reviewing this matter, the Commission is statutorily constrained to only consider the issues raised by the parties in the Petition for Arbitration and in the Response within the meaning of § 252(b)(4). If necessary, however, § 252(b)(4)(B) of the Act provides that "the commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision . . ."

16. Also, in reviewing interconnection agreements, state commissions are allowed, pursuant to § 252(e)(3) of the Act, to utilize and enforce state law in the review of agreements. Accordingly, the Commission may also consider the Nebraska Legislature's directive that: "Interconnection agreements approved by the commission pursuant to § 252 of the Act may contain such enforcement mechanism and procedures that the commission determines to be consistent with the establishment of fair competition in Nebraska telecommunications markets." *Neb. Rev. Stat.* § 86-122(1).

17. In order to fully implement § 252(e), the Commission has adopted the Arbitration Policy. Under that Policy, the Commission may only approve arbitrated agreements that: "1) ensure that the requirements of § 251 of the Act and any applicable Federal Communications Commission ("FCC") regulations under that section are met; 2) establish interconnection and network element prices consistent with the Act; and 3) establish a schedule for implementation of the agreement (pursuant to § 252(c))."

VI. ANALYSIS

A. Issue I

18. Sprint has entered into a business arrangement with Time Warner to provide competitive alternatives to customers in Falls City, Nebraska to the extent Time Warner can provide last mile facilities to customers. Time Warner would be the company customers would interface with while Sprint would provide Time Warner with certain functionalities to enable Time Warner to provide a finished telecommunications product. Sprint will provide telephone numbers, 911 circuits, to the appropriate PSAP through the ILEC's selective routers, would perform 911 database administration, directory listings, and some switching functionalities, the extent to which is disputed by the parties. Clearly, at the time the Commission granted Time Warner its certificate of public convenience and necessity in Application No. C-3228, we anticipated that Time Warner would enter the market in Falls City. The Commission granted Time Warner the authority to provide service in that area. However, we established a process in that Order by which Time Warner was to use to enter the market in competition with SENTCO. We stated that Time Warner must:

1. File written notice with the Commission when a bona fide request has been sent either by it or its underlying carrier to a rural ILEC.
2. The rural ILEC then will have 30 days in which to raise the rural exemption as a reason not to negotiate or arbitrate an agreement.
3. The Commission will rule on the rural exemption in accordance with the Telecommunications Act of 1996 (Act).
4. The parties will either negotiate or arbitrate an agreement. The parties will file the agreement for approval. The Commission will

then approve or reject the agreement in accordance with the Act.

In the Matter of the Application of Time Warner Cable Information Services, LLC, d/b/a Time Warner Cable, Nebraska, Stamford, Connecticut, for a Certificate of Authority to provide local and interexchange voice services within the state of Nebraska, Application No. C-3228 (November 23, 2004) at 5-6.

19. Time Warner has not taken any of the foregoing steps. Rather, Sprint takes the position that it is entitled to establish and interconnection agreement with SENTCO that will apply to end user customers of a third-party telecommunications carrier such as Time Warner.

20. We wholeheartedly support Time Warner and Sprint's goals to provide competitive alternatives to the Falls City consumers; however, we agree with SENTCO that Time Warner is the proper party to negotiate with SENTCO for bringing that service to Falls City. We encourage Time Warner and SENTCO, who we believe are the appropriate parties, to expeditiously work towards an interconnection agreement to provide service to customers in the Falls City exchange.

21. Independently of our finding that Time Warner is a necessary party to negotiate interconnection with SENTCO, we find, based on the record before us, Sprint has failed to demonstrate that it is a "telecommunications carrier" (47 U.S.C. § 153(44)) when it acts under its private contract with Time Warner. Further, we conclude the duty of the ILEC under § 251(b)(5) to establish reciprocal compensation arrangements extends properly to Time Warner as the entity operating the end office switch or, in this case its functional equivalent - the Time Warner soft switch - that directly serves the called party.

22. Through this soft switch, Time Warner ensures that only calls destined to the Public Switched Telephone Network originated by a Time Warner end user are transported through Sprint for termination, and it is through this soft switch that all calls are correctly routed to the Time Warner end user customers. Further, it is this soft switch that routes and delivers calls within the Time Warner network between two Time Warner end users. In this latter class of calls, Time Warner in no way utilizes the Sprint transport arrangement that Sprint and Time Warner have established through their private contract. Accordingly, we find that the soft switch operated by Time Warner provides the switching envisioned by the applicable FCC Rules and the Act. Consequently, under the Sprint/Time Warner private contract, it is only Time Warner as the owner of the

soft switch, that can request a § 251(b)(5) reciprocal compensation arrangement from SENTCO.

23. While we find that our C-3228 Order addresses this issue, we also find independently, that we reach the same conclusion based on applying applicable case law, the Act and controlling FCC rules. A necessary pre-condition for an entity to assert rights under §§ 251 (a) or (b) of the Act is that it must be a "telecommunications carrier." Compare 47 U.S.C. §§ 153(44), 251(a), and (252(a)(1). Section 153 (44) defines "telecommunications carrier" as "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in Section 226)." Section 153(46), in turn, defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."

24. Relevant FCC and judicial precedents have interpreted the definition of "telecommunications carrier" to include only those entities that are "common carriers." *See Virgin Islands Telephone Corporation v. FCC*, 198 F.3d 921, 926 (D.C. Cir. 1999) ("VITELCO"); *see also National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630 (D.C. Cir. 1976) *cert denied*, 425 U.S. 992 ("NARUC I"). Thus, as a matter of law, only where an entity is a common carrier can that entity assert rights to seek interconnection agreements under Section 251 of the Act. *See* 47 U.S.C. § 252 (a)(1); see also 47 U.S.C. § 251(a). The VITELCO court also made clear that the "key determinant" of common carrier/telecommunications carrier status is whether an entity is "holding oneself" out to serve indiscriminately." VITELCO, 198 F.3d at 927; citing NARUC I, 525 F.2d at 642. "But a carrier will not be a common carrier where its practice is to make individualized decisions in particular cases, whether and on what terms to deal. It is not necessary that a carrier be required to serve all indiscriminately; it is enough that its practice is, in fact, to do so." NARUC I, 525 F.2d at 641 (footnotes omitted); see also VITELCO, 198 F.3d at 925. Moreover, since a state commission assumes federal authority when it acts pursuant to Section 252 of the Act, the Commission is required to employ these standards when arbitrating an interconnection agreement. *See Bell Atlantic-Delaware, Inc. v. Global NAPs South, Inc.*, 77 F. Supp.2d 492, 500 (D.DE 1999) compare *AT&T Communications Systems v. Pacific Bell*, 203 F.3d 1183, 1188 (9th Cir. 1999); *Indiana Bell Telephone Company, Inc. v. Smithville Telephone Company, Inc.*, 31 F. Supp.2d 628, 632 (S.D. IL 1998).

25. Applying these standards to the record before us, we find that Sprint has not produced sufficient evidence to *persuade us that it is a "telecommunications carrier"* when it fulfills its private contractual obligation to Time Warner. Rather, Sprint's arrangement with Time Warner is an individually negotiated and tailored, private business arrangement shielded from public review and scrutiny. As such, Sprint cannot sustain any claim that it is eligible under Sections 251 and 252 to assert rights afforded "telecommunications carriers" through its arrangement with Time Warner. Although the Sprint witness testified that Sprint is willing to make its wholesale services available to others, it has not demonstrated by its actions that it is holding itself out "indiscriminately" to a class of users to be effectively available directly to the public.

26. We are unconvinced for many reasons. First, the Wholesale Voice Services Agreement is a private contract between Sprint and Time Warner and is treated by Sprint as confidential. Also, Sprint states that any agreement will be individually tailored to the cable company with which Sprint is contacting and Sprint will address the needs and capabilities as presented. *See* Ex. 102, Burt Testimony at 27. Independently, the individualized nature of Sprint's arrangements is demonstrated by the existence of both the Sprint-Time Warner Wholesale Voice Services Agreement and the Sprint-Cable Montana LLC Wholesale Voice Service Agreement. *See* Ex. 20. Thus, the record confirms that Sprint tailors its arrangements with respect to those entities with which it wishes to contract. Further, Sprint has no tariff in place describing the standard business relationship that it will provide to an entity. *See* Ex. 102, Burt Testimony at 27. While Sprint has indicated that it will file such a tariff if directed by the Commission, we question that suggestion in that no submission of the sort has been made. Even if a tariff filing were to be made, we need the opportunity to scrutinize whether, as a matter of fact, the tariffed relationship was an indiscriminate offering of Sprint. In addition, the only service that Sprint unequivocally states will be offered "to the general public" is Sprint's offering of "exchange access." *See id.* at 21-22. However, we note that exchange access is the input for telephone toll services and is not local exchange traffic that is subject to § 251 (b)(5) reciprocal compensation according to 47 C.F.R. § 51.701(a) and (b) in which the FCC expressly excluded "intrastate exchange access" from the definition of "telecommunications traffic" to which reciprocal compensation applies.

27. Based on the record, there is only one user of Sprint's private contract services in Nebraska, Time Warner. *See* Ex. 20, Sprint Response to Admission No. 7. As one court

noted, there is a substantial question as to whether a "single network user" could be found to be a "common carrier without being arbitrary and capricious . . ." United States Telecom *Association v. FCC*, 295 F.3d 1326, 1335 (D.C. Cir. 2002). Thus, as a consequence of Sprint's provision of services to Time Warner, Sprint fails to convincingly persuade us that its private contract service fits within the "classes of users as to be effectively available directly to the public . . ." in order to make Sprint qualify as a telecommunications carrier.

28. Sprint points out that a few other state commissions have addressed the type of contractual relationship established between Sprint and Time Warner. *See* Post-Hearing Brief of Sprint Communications Company L.P. (September 2, 2005) at 9. Specifically, Sprint states, the Illinois Commerce Commission, the New York Public Service Commission and the Public Utility Commission of Ohio have held that a service provider which provides network interconnection and other similar services to cable companies can interconnect with rural LECs. *Id.* We have reviewed those decisions but we cannot agree with their conclusions based on the legal arguments and the facts provided to the Commission in this case.

B. Issue II

29. Even if Sprint were a telecommunications carrier when it fulfills its private contractual obligations to Time Warner we also find that Sprint cannot assert any right to seek § 251(b)(5) reciprocal compensation. In establishing the pricing standards for reciprocal compensation, Congress stated that "such terms and conditions [for reciprocal compensation] provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network of calls that originate on the network facilities of the other carrier." 47 U.S.C. § 252(d)(2)(ii). Moreover, the "origination" of a call occurs only on the network of the ultimate provider of end user service, which the FCC confirmed.

> We define "transport," for purposes of section 251(b)(5), as the transmission of terminating traffic that is subject to section 251(b)(5) from the interconnection point between the two carriers to the terminating carrier's end office switch that ***directly serves the called party*** *(or equivalent facility provided by an non-incumbent carrier).*

See In the Matter of Implementation of the Local Competition *Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Radio Service Providers, First Report and Order*, CC Docket Nos. 96-98 and 95-185, 11 FCC Rcd 15499 (1996) at 16015 (¶1039) (emphasis added). Further, the applicable FCC rules state the same concept.

> (c) *Transport.* For purposes of this subpart, transport is the transmission and any necessary tandem switching of telecommunications traffic subject to section 251(b)(5) of the Act from the interconnection point between the two carriers to ***the terminating carrier's end office switch that directly serves the called party,*** or equivalent facility provided by a carrier other than an incumbent LEC.
>
> *(d) Termination.* For purposes of this subpart, termination is the switching of telecommunications traffic at the ***terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party' s premises.***
>
> *(e) Reciprocal compensation.* For purposes of this subpart, a reciprocal compensation arrangement between two carriers is one in which each of the two carriers receives compensation from the other carrier for the *transport* ***and termination*** on each carrier's network facilities of ***telecommunications traffic that originates on the network facilities of the other carrier.***

47 C.F.R. §§ 51.701(c), (d) and (e) (emphasis added).

30. When these standards are applied to the facts, we find that substantial record evidence confirms that it would be Time Warner *not* Sprint that could assert the right to seek a reciprocal compensation arrangement under § 251(b)(5) with SENTCO. First, the record is clear that Time Warner serves the "called party" and is the only entity with the relationship with that end user that is the called party. *See, e.g.*, Tr. 27:20-23, 28:3-6.

31. Second, Time Warner operates the end office switch or equivalent facility since Time Warner has a "soft switch" (*see* Ex. 16, at 31 (lines 5-21)); it is the soft switch that performs switching since only those calls that are intended to be sent to

the Public Switched Telephone Network are sent to Sprint with all other calls between Time Warner end users being switched *solely between those end users by Time Warner. See, e.g., Tr.* 43:5-44:6. To this end, we agree with SENTCO that Sprint's efforts to equate the term "end office switch" with a Class 5 end office should be rejected. Since the term used by the FCC is "end office" or "equivalent facility" (*see* 47 C.F.R. §51.701(c)), industry identifiers for Class 5 switches are not controlling. *See* Tr. 147:3-19.

32. Finally, the record confirms that all calls either originate or terminate on the Time Warner network facilities. *See, e.g.,* Ex. 102, Burt Testimony at 6 (line 131). Therefore, Sprint *does not* "directly serve . . . the called party" (47 C.F.R. §51.701(c)), nor does the traffic "originate" on Sprint's network. 47 C.F.R. § 51.701(e). Rather, it is Time Warner that owns the "last mile" over which the end user will "originate" a call, it is Time Warner's facilities that will "directly serve . . . the called party," and it is Time Warner's soft switch (or Sprint's newly enunciated term for Time Warner's soft switch - the Time Warner "PBX-like switch") that terminates the call and provides the final switching to the called party.

33. We find unpersuasive Sprint's efforts to recast the network arrangement it anticipates having with Time Warner. Sprint seems to suggest that the Time Warner-provided network components are comprised of only the "local loop" (*see, e.g.,* Ex. 102, Burt Testimony at 6 (lines 131-132), 15 (line 354) to 16 (line 356) and Ex. 107), also suggesting that the Time Warner soft switch is a "PBX-like switch." Ex. 102, Burt Testimony at 16 (line 370). From the testimony provided by Time Warner, we believe Time Warner operates a soft switch and that this device provides switching not only for Time Warner end user to Time Warner end user calls but also for those calls made by and sent to a Time Warner end user from another carrier's end users.

34. Accordingly, we reject Sprint's efforts to suggest that its current network description *now* differs from that previously described to the Commission. Even during his testimony at the hearing, Sprint witness Burt stated "Any - any call that does not go to the pubic switch telephone network, such as the example you gave, one Time Warner Cable subscriber to another, would stay within *Time Warner Cable switch.*" Tr. 47:5-9 (emphasis added). We are not persuaded by Sprint's attempts to portray its switching facilities as the switch that directly serves the Time Warner end users.